IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 658

UNITED STATES OF AMERICA, To the Use of NOLAND COMPANY, INCORPORATED, A Corporation, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, Trading as IRWIN & LEIGHTON, and UNITED STATES GUARANTEE COMPANY, A Corporation, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENTS.

PRENTICE E. EDRINGTON,
A. M. HOLCOMBE,
438 Munsey Building,
Washington, D. C.
Attorneys for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT OF THE CASE.

This matter is before this Court on a petition for a writ of certiorari granted to review a decision of the United States Court of Appeals for the District of Columbia holding that a materialman to a subcontractor could not sue on a "*payment bond*" required to be given to the United States by the prime contractor pursuant to the interpretation of the Miller Act (40 U.S.C.A. 270a) by the Secretary of the Interior acting as Federal Emergency Administrator of Public Works for materials furnished to a subcontractor

for the construction by the United States of a privately owned library building at Howard University in the District of Columbia.

The opinion of the District Court (R. 6) is not reported. The opinion of the Court of Appeals is reported in 172 F. (2d) 73.

The petition praying for the issuance of the writ was based on three grounds, to-wit:

I. Conflict with a decision of the Sixth Circuit Court of Appeals: (*Peterson* v. *United States*, 119 F. (2d) 145.)

II. Conflict with a decision of this Court. (*Perkins* v. *Lukens Steel Co.*, 310 U. S. 113), and

III. That the Court below failed to give recognition to the necessarily inherent power of an administrative officer to make provisions in a public contract for payment to laborers and materialmen, as a proper incident of the authority to contract, without regard to express statutory direction.

The crux of the case concerned the authority of the administrative officer to require of the contractors a "*payment bond*" for the protection of materialmen furnishing materials to a subcontractor for use in the prosecution of the work under the contract, from funds appropriated by the Congress for the construction of a library building on privately owned lands of a corporation for uses which, although for the benefit of a small portion of the public, are not even remotely connected with any "public building or public work of the United States" within the meaning of the Miller Act (40 U.S.C.A. 270a), or other Act of Congress having to do with the spending of public money for the public good.

REPLY TO POINTS RAISED IN PETITION:

I. There is no conflict with the decision of the Sixth Circuit Court of Appeals.

In *Peterson* v. *United States*, 119 F. (2d) 145, the Circuit Court of Appeals held that the railroad company tunnel and other work under the contract were constructed as *an incident to* a public work of the United States, and did not hold the tunnel itself to be a public work. The Court held that the improvement of a navigable river was a public work of the United States, and that the relocation of the railroad's private tracks and the necessity to construct a tunnel in so doing was primarily to facilitate the improvement of the stream, not to benefit the railroad company. The Court in its opinion at page 147, said:

> Here the contemplated improvement was one to facilitate and control the flow of water in the streams, and was an undertaking for the benefit of the public at large. The enterprise was public in its nature and the work in no respect inured to the benefit of the railroad company. It had its road-bed and its tracks, and but for the impounding of the waters, could have continued their use. The relocation of the railroad was but an incident to the principal objects for which the work was being done, to-wit, flood control and navigation. *Chattanooga & Tennessee Co.* v. *United States*, (6 C.C.), 209 Fed. 28.

and again at page 147 of its opinion, the Court said:

> It is settled law that the United States may enter into contracts for the improvement of navigation and as an incident thereto may provide for the removal and relocation of public utilities interfering with such improvement. *Brown* v. *United States*, 263 U. S. 78, 82, 44 S. Ct. 92, 68 L. Ed. 171.

It was the removal of the railroad's tracks from the stream that was the public benefit in the *Peterson* case, not the construction of the tunnel and relocation of the tracks

on private ground, and that is made clear by the Court's opinion. Indeed, the Court distinguished the railroad company's tunnel from the Howard University dormitories of the *Maiatico Construction Co. case* (65 App. D. C. 62, 79 F. (2d) 418) on this very ground, saying:

> The case of Maiatico Construction Co. v. U. S. * * * also relied upon by appellants, has no application. In that case the United States contracted for the erection of three dormitory buildings of the Howard University, a private corporation. The Government had no title or interest in the property and the school was not for public use, although it may have been remotely for public benefit.

Thus the Court of Appeals of the District of Columbia in following the *Maiatico* case herein as to what constitutes a public building or public work of the United States, is not in conflict with the holding of the Court of Appeals for the Sixth Circuit; and the asserted ground for seeking a review of the decision below in the instant case because of conflict of opinion with another Circuit Court of Appeals vanishes completely.

II. The opinion below does not conflict with this Court's decision in the case of Perkins v. Lukens Steel Company, 310 U. S. 113.

Respondents find nothing in the decision of this Court in the *Perkins* v. *Lukens* case that applies to any question raised by petitioner herein, or that applies to the jurisdiction of the Court below to hear and decide the special appeal brought there by respondents from the refusal of the District Court to dismiss the original action upon respondent's motion. In the *Lukens* case the District Court of Appeals had issued a sweeping injunction against important Government officers forbidding them to require government contractors to pay minimum rates of wages as established by the Secretary of Labor under an act of Congress the meaning of which was challenged in the suit; but this injunction

was not restricted to the parties who had appeared in the case as complainants, and this Court found that said parties had no standing to represent the entire steel industry. This Court did not hold that the action of the Secretary of Labor in making determination of wage rates in various localities for carrying into effect an Act of Congress could not be reviewed by the United States Courts in a proper action; and there is nothing in the opinion indicating that the Secretary had any such immunity from judicial process as is asserted by petitioner in its brief herein. The action failed for lack of sufficient interest in the parties who brought it—not for want of jurisdiction of the defendant or the subject matter.

As was said by the Court of Appeals in its opinion below with respect to petitioner's argument that the *Lukens* case controlled the proposition that the action of the Secretary is not subject to judicial review (R. 136-137):

> There is nothing in the Miller Act which in any sense parallels the situation which existed in the Lukens case and there is nothing in our view, in the opinion in the Lukens case which has any relation to the question in the present case. In this action appellee sought to obtain a right under a bond executed pursuant to a statute of the United States. If, as we hold, no authority was granted the Secretary to require such a bond, there is certainly nothing in the Lukens case which destroys the right of a person sued on a bond to make that defense.

The underlying authority of the Secretary of Labor was not challenged in the *Lukens* case. Only the correctness of her determination was challenged, and for this she was responsible to the Congress the opinion says; but as the mistake, if any, had not directly injured any of the complainants, the Court held that they had no standing to enforce the duty of the Secretary of Labor to Congress or to the industry as a whole. This decision falls far short of holding that the Secretary's duty to interpret the statute correctly is not enforceable in the courts at the instance of a proper party in interest.

Respondents here have not attempted to interfere with the Federal Administrator for Public Works in the performance of his duty prescribed by an Act of Congress, but Respondents do challenge the validity of the "payment bond" sued upon as not having been authorized by any Act of Congress and because, under the laws of the District of Columbia, it is unenforcible against respondents in a suit by a third person not named in the bond.

III. The Court below properly refused to be bound by the unauthorized and erroneous interpretation of the Miller Act by the Administrator of Public Works who has no power, inherent or otherwise, to require the giving of a Miller Act "payment bond" or any other bond for the protection of laborers and materialmen except in connection with a contract for the construction of a public building or public work of the United States within the meaning and intent of said Miller Act.

The Court below, following its prior decision in the *Maiatico* case, held (R. 135) that the "Secretary overlooked the fact that Howard University is a private corporation and accordingly required a bond under the Miller Act. In this respect he was clearly in error."

The record shows that, pursuant to the authority of the National Industrial Recovery Act approved June 16, 1933, 48 Stat. 201, 40 U.S.C.A. 402, the Administrator of Public Works issued regulations designated as "Bulletin No. 51," containing instructions to contracting officers which related to the execution of Federal contracts. (R. 27.) Under Sec. 2(a) of this Bulletin No. 51 contracting officers were required on Federal projects to demand of contractors a performance bond on standard form No. 25, and a payment bond on standard form 25A. By Sec. 5 of this Bulletin No. 51, (R. 28) it was provided that "the contracting officer must, when required by statute, or in the absence of statute may, in his discretion, require either or both of said bonds."

In the Government's bid data furnished to prospective bidders the proposed specifications, which later became part of the contract, by Par. G-12, (R. 29-30) specifically required the furnishing both of a performance *and a payment bond* as required by the Act of Congress approved August 24, 1935, and added: "(See Public No. 321—74th Congress—H. R. 8519 attached to and made part of these specifications.)" But the statute (Miller Act) does not go so far.

Petitioner in effect contends that the Administrator of Public Works by regulations may extend and enlarge the requirements of the Miller Act and require a "payment bond" on a contract for the construction of a building not a public building of the United States and that the Courts are powerless to declare such regulations a nullity even when it is apparent that the regulations have the effect of enlarging the requirements of a statute to the detriment of those contracting in reliance upon the common law.

The only statutory authority for the giving of a "*payment bond*" is found in the Miller Act. This Act, however, only requires such a payment bond in connection with a contract for the construction, alteration and repair of a "*public building or public work of the United States.*" And only in the Miller Act is provision made that the payment bond shall be for the protection of laborers and materialmen performing work or supplying materials in connection with the contract.

Therefore, unless this Court holds that executive officers of the Government have the power and authority to enlarge and add to the specific and clear requirements of a statute in contravention of the common law, as petitioner has asked this Court to do in this case, petitioner's point III passes from the case.

It is well settled that the United States Courts may review the actions of Government Officials where it is alleged that they have acted beyond their powers. *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Dismuke* v. *United States*, 297 U. S. 167; *Southern Pacific Ry.* v. *Interstate Commerce*

Commission, 219 U. S. 433; *Skinner & Eddy Body Co.* v. *United States*, 249 U. S. 557.

The case of *Perkins* v. *Lukens Steel Co.*, cited and relied upon by petitioner, does not change the law in this respect; it goes only to the standing of the persons seeking to restrain a public official, and because such persons cannot use the courts for that purpose in the absence of any invasion of their private rights, it does not follow that the *ultra vires* acts of administrative officials cannot be challenged in a proper case by persons whose private rights are prejudiced thereby.

If, as asserted by Petitioner, the Miller Act or the National Industrial Recovery Act gave the Secretary of the Interior acting as Federal Emergency Administrator of Public Works the authority to determine in the first instance whether a project is or is not a public building or a public work of the United States, and to make rules and regulations governing the determination of this question by him, or his subordinates, any determination of this question so made clearly is reviewable by the Courts; and when the Secretary, acting as Administrator of Public Works, promulgated regulations which required a Miller Act payment bond on contracts for construction of a privately owned building, not a public building or public work of the United States, he erroneously construed the requirements of the Miller Act and his authority to require such a bond thereunder, and the Court below properly refused to follow his error.

If officials of the Government Departments entertain erroneous views of their powers and of the construction to be placed upon an act of Congress, their decisions cannot make it the duty of the Courts to perpetuate the error, and override the statute and deprive individuals of their contract rights. *Roxford Knitting Co.* v. *Moore & Tierney*, 265 Fed. 177, 190 (2 C. C. A.) petition for certiorari denied, 253 U. S. 498.

In *Sanford's Estate* v. *Commissioner*, 308 U. S. 39, 52, this Court said:

But Courts are not bound to accept administrative construction of a statute regardless of consequences even when disclosed in the form of rulings.

An administrative ruling, promulgated under a statute authorizing an administrative officer or board to prescribe rules and regulations for its administration which operate to create a rule out of harmony with the statute, is a nullity. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129; *Helvering* v. *Safe Deposit and Trust Co.*, 95 Fed. (2d) 806.

A department or bureau cannot adopt arbitrary and unreasonable regulations to supply omissions in a statute. *Santa Monica Mountain Park Co.* v. *United States*, 99 F. (2d) 450, certiorari dismissed, 306 U. S. 666.

In *Newberger* v. *Commissioner*, 311 U. S. 83, this Court said:

> Under different circumstances great weight has been attached to administrative practice and Treasury rulings, but beyond question they cannot narrow the scope of a statute when Congress plainly has intended otherwise. *Rasquin* v. *Humphreys*, 308 U. S. 54; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294.

If regulations cannot narrow the scope of a statute, *a fortiori* the regulations cannot enlarge the statute thereby creating law in derogation of common rights. *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599.

It would seem plain that, when the Federal Administrator of Public Works, by his Bulletin No. 31 and the provisions of the specifications of the construction contract issued under his direction and approval, required that Respondent, the contractor, furnish a "payment bond" under the Miller Act, in connection with the contract for a library at Howard University, he was in error and his action is void as held by the Court below.

Petitioner in effect contends that the Miller Act is mandatory and compels contracting officers to require a payment bond to secure laborers and materialmen whenever

such contracting officer signs a contract on behalf of the United States irrespective as to whether such contract relates in fact to a public building or a public work of the United States, or relates to a building constructed by the United States for a private corporation on private property. For support of this contention, petitioner cites Sec. 1(c) of the Miller Act, U. S. C. A. Title 40, Sec. 270(c), as authority. This subsection reads:

> Nothing in this section shall be construed to limit the authority of any contracting officer to require a *performance bond* or other security in addition to those or in cases other than the cases specified in subsection (a) of this section. (Emphasis supplied)

It will be observed that the quoted subsection only mentions a "*performance bond*" and is completely silent respecting a *payment bond*. The language is perfectly clear. If there were room for any ambiguity the hearings before the Judiciary Committee when it was considering the various bills leading to the enactment of the Miller Act completely dispose of petitioner's contention.

When Mr. Laws, Chief of the Legal Section, Procurement Division, Treasury Department, appeared before the Committee in support of that Department's proposed draft of a bill (R. 76) his suggested bill included the following comparable provision:

> Sec. 3(a) The head of the department or bureau having charge of the work may, in his discretion, require a performance or payment bond in cases other than those specified in section 1 hereof. (R. 84)

When asked by a Committee Member the purpose of this proposed section Mr. Laws said:

> I think that that merely means this, to give you an example: Suppose that we had a $1,000 contract that we thought ought to be bonded. This would authorize the head of the department to require a bond. That is about the only case I can think of. There might be other cases that would be covered by that, but offhand none occurs to me. (R. 84)

When H. R. 8519 was reported favorably by the Judiciary Committee (R. 91, *et seq.*) and finally enacted and approved on August 24, 1935, the "payment bond" provision suggested by the Treasury Department was entirely omitted from subsection (c) of Section 1 of the Act. From this it appears that the failure of the Congress to include the provision suggested by the Treasury Department in its proposed bill was deliberate. It may be added that the hearings show no case in which a payment bond might be desirable other than as provided in Section 1 of the Miller Act.

The language of Subsection (c) of the Miller Act applies only to the provisions of the Act as to *performance bonds*, and was apparently inserted to avoid any implication that a contracting officer had no authority to require bonds or other security on contracts for less than $2,000, and to avoid a contention that the heretofore unwritten power of public officials to exact a *performance bond* or security in favor of the United States had been repealed.

In short, respondents maintain that all that Congress intended by the adoption of subsection (c) of Sec. 1 was to make it clear that contracting officers were not to be deprived of their existing authority to require a *performance bond* to guarantee the performance of the contract where the amount of the contract was in an amount less than $2,000.

RESPONDENTS' REPLY TO PETITIONER'S BRIEF.

I. The library building at Howard University is a privately owned building and the construction thereof by the United States was not a public work of the United States within the meaning of the Miller Act.

Under the facts of this case petitioner does not claim that the library building constructed by the Government under its contract with respondent, Irwin & Leighton, is a "public building of the United States", but apparently bases its argument on the proposition that the construction of the building was a public *work* of the United States. This is a misinterpretation of the language of the statute (Miller Act, 40 U. S. C. A. 270a) and of the decisions of this Court as to what constitutes a "public work".

"Public work", as this term is used in the statute, is of the same genus as "Public building" and relates to the structure itself as distinguished from the functions of "construction, alteration and repair" to be performed under the contract.

The Miller Act did not in any manner change the intent and purpose of the Heard Act, but was passed to clarify the meaning of and simplify the procedure required by the Heard Act. In the place of the dual bond required by the Heard Act, the Miller Act provides for two separate bonds, *i.e.*, a performance bond payable to the United States to secure the performance of the contract, and a payment bond also payable to the United States to secure laborers and materialmen, thereby accomplishing the same purposes of the Heard Act. (See Committee Report on Bill, R. 91-95)

The Miller Act provides that before any contract exceeding $2,000 in amount, for the construction, alteration and repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States (1) a performance bond to secure the execution of the contract and for the protection of the United States, and (2) a payment bond for the protection

of all persons supplying labor and materials in the prosecution of the work.

Under the Heard Act, repealed by the Miller Act, the statute failed to use the qualifying words "of the United States", but following this Court's interpretation of public buildings and public works to mean public buildings and public works of the United States, the Miller Act specifically limited its application to "public building and public work *of the United States*".

There is no basis in the language of the statute authorizing the taking of a "payment bond" for drawing any distinction whatsoever between a "public building" and a "public work" in determining whether either is or is not within the meaning of the modifying phrase "of the United States" as these words are used in paragraph (a) of Section 1 of the Miller Act. And the library building erected on the private property of Howard University is certainly not a structure belonging to the United States so as to constitute a "public building of the United States" as this language has been interpreted by the Courts of the United States. *United States* v. *Metropolitan Body Co.*, 79 F. (2d) 177; *Title Guarantee & Trust Co.* v. *Crane*, 219 U. S. 24; *United States* v. *Ansonia Brass, etc. Co.*, 218 U. S. 452, 470, 474; *Maiatico Construction Co.* v. *United States*, 79 F. (2d) 418; *Peterson* v. *United States*, 119 F. (2d) 145.

There is no valid reason for extending the authority of the contracting officer to require a payment bond for the protection of laborers and materialmen under contract for the construction of buildings on privately owned lands because these private building operations are already fully protected by the mechanics lien laws of the District of Columbia and the States.

It must be presumed that Congress was fully cognizant of the decisions of the Courts long recognizing the distinction between public and private construction as it effects the lien laws, and it is proper to assume that Congress appreciated this legal distinction and phrased the Miller Act in accordance therewith to exclude private construction.

(A). FACTS SUPPORTING THE DECISION BELOW THAT THIS IS NOT A PUBLIC WORK.

By Act approved February 14, 1931, 46 Stat. 115, Congress authorized the construction at Howard University of a library building to cost not more than $800,000 of which sum $400,000 was made immediately available. A portion of the sums made available by this Act where used for architectural fees, (R. 116). Soon after the enactment of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 201, 40 U. S. C. A. 402, the original appropriation made available by the Act of Feb. 14, 1931, was impounded (R. 114). Thereupon, the Administrator of Public Works (the Secretary of the Interior), with the approval of the President, made an allocation of funds for the construction of the library building, heretofore authorized by the Congress, presumably under a section of the Recovery Act authorizing "(c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interest of the general public." (40 U. S. C. A. Sec. 402, c) (R. 97, 99)

The plans and specifications to serve the needs of the University were prepared by an architect of its choice and when presented to the Secretary of the Interior acting as Administrator of Public Works and approved by that official; he approved the will of the University. (R. 117) Invitations were issued by the Interior Department for bids. The bid data stated, as did Public Works Administration Bulletin No. 51, part of the bid data, that the successful bidder would be required to execute a performance bond and a *payment bond* as required by Public Act No. 321, 74th Congress, approved August 24, 1935, the Miller Act. (R. 98, 27, 28) A copy of H. R. 8519, the Miller Act, was annexed to and made part of the specifications. (R. 30)

Irwin & Leighton, one of the respondents herein, being the low bidder, entered into a contract with the United States, represented by the Assistant Secretary of the Interior as contracting officer, and, as called for by the bid

data and Bulletin No. 51, on forms supplied to the contractors by the Interior Department, they furnished a performance bond and a payment bond pursuant to the provisions of the Miller Act. (R. 20, 21, 22)

A premium of 1% of the contract price was paid for the performance bond (R. 23) but from the record it does not appear what, if any, premium was paid for the payment bond. (R. 21)

The National Industrial Recovery Act contained no provision for any bond to secure faithful performance of any of the contracts made pursuant to its provisions.

When petitioner filed its suit below it was brought in the name of the United States for its use and benefit and was expressly based upon the Miller Act. (R. 1) Defendant below moved the dismissal of the action on the ground that the library building on the campus of Howard University was not a public building or public work of the United States. (R. 3) This motion was denied and a special appeal was granted by the Court of Appeals of the District of Columbia, who, after hearing, reversed the judgment of the District Court.

The evidence is uncontradicted that Howard University is a private corporation (R. 106) organized by Act of Congress approved March 2, 1867, 14 Stat. 438. Its charter gives it all rights and powers usually vested in private corporations, including the right to purchase and sell real estate, and the right to contract and to sue and be sued. (R. 123) The University is controlled by a Board of Trustees and for the past 70 years has owned in fee its campus upon which was erected the library building in suit and has never consented to the transfer to the United States of this land. (R. 111, 112)

Funds for the maintenance and operation of the University are derived from private sources by donations from individuals and private educational foundations as well as from tuition from its students. (R. 108) It has an endowment secured from private sources the interest from which is expendable. (R. 108, 114). Annual appropriations have been made by Congress for the University, these Federal

contributions amounting to approximately $600,000.00 per year. (R. 112)

The facts in this case are identical to those presented in the case of *Maiatico Construction Co. v. United States*, 63 App. D. C. [illegible] 9 F. (2d) 418, cert. denied 296 U. S. 649. The only difference is that in the cited case the action involved the Heard Act, 40 U. S. C. A. 270, whereas this action involves the Miller Act, 40 U. S. C. A. 270a.

In sustaining its decision in the *Maiatico case, supra*, the lower Court pointed out that the main purpose of the Miller Act was to relieve certain procedural trouble found in the existing law and to shorten the period when under that act suit might be instituted against the surety. This is amply sustained by the hearings before the Judiciary Committee when it was considering the bills which became the Miller Act. (R. 33 to 95)

(B) CASES SUPPORTING THE DECISION BELOW THAT THIS IS NOT A PUBLIC WORK.

Respondents contentions are that the generosity of the Federal Government in providing funds to construct a building for Howard University did not *per se* change Howard University from a private corporation into a public institution of the United States. The library building erected upon the private property of the University under contract entered into by the United States became nevertheless the private property of the University and was not at any time a public building or public work of the United States.

Accordingly, a payment bond taken for the protection of laborers and materialmen under the Miller act, applying exclusively to the construction of public buildings and public works *of the United States*, cannot serve to sustain petitioner's claim for materials supplied to a privately owned building. *United States* v. *Faircloth*, 49 App. D. C. 323, 265 Fed. 963; *United States* v. *Empire State Surety Co.*, 114 App. Div. 755, 100 N. Y. Sup. 247; *Penn Iron Co.* v. *Trigg*, 106 Va. 557, 56 S. E. 329. *Maiatico* v. *United States*, *supra*; *Peterson* v. *United States*, 119 F. (2d) 145. To the same

effect is the recent case of *United States* v. *Metropolitan Body Co.*, 79 F. (2d) 177, wherein it was said that mail truck bodies, which during construction, remained at risk of contractor and did not become property of the United States until completed, delivered and accepted by the Government, were not "public work" within the statute requiring contractor for public work of the United States to furnish bond for payment to materialmen. These cases are sustained by decisions of this Court.

In *Title Guaranty & Trust Co.* v. *Crane*, 219 U. S. 24, 31, the question arose as to whether a vessel being constructed under contract for the United States was a public work of the United States within the meaning of the Heard Act. The contract provided that as partial payments were made those portions of the vessel as were paid for were to pass to the United States. Under the Heard Act a bond was required in connection with every contract for the contraction, alteration or repair of a public building or public work but that Act did not, as does the Miller Act, refer to these buildings or works as "public buildings or public works *of the United States.*" In interpreting the Heard Act, Mr. Justice Holmes stated that if the steam vessel was not a public work *of the United States* no action could be maintained on a bond given to secure laborers and materialmen under the Heard Act.

In *United States* v. *Ansonia Brass, etc. Co.*, 218 U. S. 452, 470, 474, this Court held with respect to vessels that did not pass to the United States in part as partial payments were made to the contractor, and such vessels only became the property of the United States when completed and accepted, that the lien laws of Virginia applied and no right to materialmen accrued under a bond given pursuant to the Heard Act.

In view of these decisions it is difficult for Respondents to follow Petitioner's argument that the Library Building at Howard University could in any sense be considered a public building or public work of the United States within the meaning of the Miller Act.

(C) PETITIONER'S ARGUMENT DOES NOT SUPPORT ITS CONTENTION THAT THIS IS A PUBLIC WORK.

Petitioner argues that because the National Industrial Recovery Act authorized the construction of Public Works that any work undertaken pursuant to the Act became public works of the United States.

In passing upon this contention the Court below tersely said: "* * * this does not follow" (R. 134). As pointed out by the Court below, the National Industrial Recovery Act provided for public works of states, municipalities, political subdivisions of states, public agencies of states, public corporations, boards and commissions and private corporations engaged in constructing bridges, tunnels, docks, viaducts, water works, canals and markets devoted to public use and self-liquidating in character. As a result of this the United States have loaned money to municipalities to build electric light plants and water works and the administrator has supervised the contracts for carrying them out. These projects may be public works in the sense that they are intended to benefit the general public using them, but it is self-evident that they are not *public works of the United States* in fact or in law, and there is nothing in the National Industrial Recovery Act to indicate that Congress intended to change the well established status of such works.

Respondents submit that Congress cannot by fiat make that which is not a public building or public work of the United States into a public building and public work of the United States, when in fact the building, as proven in this case, is a private building and not a public building of the United States. Nor can it authorize executive officers of the Government to do so. As was said by this Court in *Block* v. *Hirsch*, 256 U. S. 135, in upholding the District of Columbia Rents Act:

> No doubt it is true that a legislative declaration of facts that are material only on the grounds for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts,

Citing: *Shoemaker* v. *United States*, 147 U. S. 282, 298; *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 606; *Prentice* v. *Atlantic Coast Lines*, 211 U. S. 210, 227; *Producers Transportation Co.* v. *Commission*, 251 U. S. 226, 230.

This rule of law was followed in *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, in which case this Court held the language of the Act declaring that emergencies growing out of the war still existed was not controlling, citing cases to show that "the court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law".

It follows from this that the erroneous classification of the project for the construction of the library building at Howard University as a Federal Project under regulations prescribed by the Administrator of Public Works, and the consequent requirement that a "payment bond" be given pursuant to the statutory provisions of the Miller Act relating solely to public buildings and public works of the United States, is reviewable in a proper proceeding where the validity of such bond is questioned.

II. The action of the Secretary in demanding a "payment bond" pursuant to the Miller Act, is reviewable by the Courts, and such action can be set aside.

Point II of Petitioner's brief is fully answered in this brief in Respondent's reply to Point III of the petition applying for the writ, at page 6 of this brief.

III. The bond cannot be enforced either within or without the confines of the Miller Act.

Petitioner contends that the "payment bond" is fully enforcible as a private obligation. Respondents urge that the common law of the District of Columbia does not permit suit on a bond for the benefit of one who is neither party or privy thereto in the absence of a statute altering the common law rule.

The Court of Appeals in its opinion (R. 129-137) we believe has sufficiently disposed of petitioner's third argument when it pointed out that a suit in the name of the United States for the benefit of a third party cannot be brought upon a voluntary bond given to secure the performance of a contract with the United States in the absence of a Federal statute which authorizes it, citing: *United States* v. *Faircloth*, 49 App. D. C. 329, 265 Fed. 963; *Penn Iron Co.* v. *Trigg*, 106 Va. 557, writ of error dismissed, 215 U. S. 611.

In *Sun Indemnity Co.* v. *American University*, 26 F. (2d) 556, 557, the Court of Appeals of the District of Columbia said:

> He was not a party to the obligation, and, under the rules of the common law followed by state and federal courts in this country, he cannot maintain an action upon it in his own name.

In that case the Court pointed out that the bond was given to protect the University against liens which might have been filed by laborers and materialmen under the mechanics lien laws of the District of Columbia, and not for the protection of the claimant.

In *Maiatico Construction Co.* v. *United States*, 79 F. (2d) 417, 424, the same Court on this same point said:

> The same result follows if it be considered a common law bond; for at common law an obligation to which one is neither party nor privy furnishes no protection.

Hence, whatever inherent power there may have been in the Secretary of the Interior acting as Federal Administrator of Public Works to require a bond necessary to protect the *United States*, in the absence of express statutory authority, this power does not exend to the protection of *third parties* not named in the bond, and such parties cannot maintain a suit upon such a bond in the District of Columbia.

In support of its specification of error on the part of the Court below in denying its right of recovery upon the bond

as a private obligation for the benefit of third parties, petitioner cites *Bruckner-Mitchell* v. *Sun Indemnity Co.*, 65 App. D. C. 178, 82 F. (2d) 434, as authority for its proposition.

The cited case relates to a contract for the construction of a High School Building, a public building of the District of Columbia. Under a statute (Act Feb. 28, 1889, 30 Stat. 906, as amended by Act. Sept. 1, 1916, 39 Stat. 688, D. C. Code, 1929, Title 20, Sec. 47) comparable to the Heard Act applicable to public buildings of the United States, a bond was required to secure the payment of laborers and materialmen in the construction of public buildings for the District of Columbia. The surety tendered by the contractor was not entirely satisfactory to the Commissioners of the District of Columbia, who required the first surety to furnish agreements of other sureties guaranteeing to indemnify the District of Columbia against the failure of the first surety to carry out its obligations under the bond within certain limitations. In order to comply with the requirements of the Commissioners, the first surety secured from several other surety companies, re-insurance agreements in favor of the District of Columbia, whereby they guaranteed, within the limitations of their respective agreements, to make good to the District of Columbia such amounts as the first surety would be in default, it being the intention of the re-insurance agreements, "to guarantee and indemnify the District of Columbia against loss under said bond" furnished by the contractor and executed by the first surety, and, containing the further covenant that in case of default on its bond the said re-insurer may be sued by the District of Columbia for the amount of the re-insurance or whatever the amount of the default may be less than said amount.

In addition to the re-insurance agreements between the first surety and its re-insurers, the first surety delivered to the District of Columbia separate contracts under seal with each of the other sureties, in terms identical with the re-insurance agreement between the sureties for the respective amounts of re-insurance paid for, agreeing that they might

be sued on the bond. After the delivery of the re-insurance agreements to the District of Columbia, the first surety procured from the same re-insurers additional re-insurance agreements under seal on a form called "Standard Form of Re-insurance Agreement", identical in all respects to the original re-insurance agreements, to which was attached as part thereof a copy of the original bond to the District of Columbia, signed by the first surety, which bond provided, as required by the statute under which it was given, for payment of laborers and materialmen.

Thereupon, the original bond signed by the first surety was approved by the owners, the Commissioners of the District of Columbia.

During the prosecution of the contract the first surety failed. A subcontractor brought suit in equity in its own name under the bond and re-insurance agreements, against the signers thereof to recover the balance claimed due.

In allowing recovery the court said: "* * * it is true that materialmen are not named parties in the insurance agreements and cannot *at common law* sue thereon as parties"; but the Court distinguished the case on the facts as permitting recovery where *the bond was given pursuant to a statute* and the re-insurance agreements provided for liability to a third party beneficiary as set forth in the bond, thus affording an *equitable* basis for the suits on the *agreements*.

Thus in the *Bruckner-Mitchell case*, the Court sustains our view that in the absence of a statute a materialman cannot sue on a bond given to protect the owner in the performance of the contract, notwithstanding the condition thereof that the contractor "shall make payment to all persons supplying labor and materials in the prosecution of the work contemplated by the contract." (82 F. (2d) 434, 445)

And the Court in this case affirmed its previously stated views in the case of *Sun Indemnity of N. Y. v. American University*, 58 App. D. C. 184, 26 F. (2d) 556, saying that "said case is not contrary in its implications from the conclusions we reach."

Furthermore, in the *Bruckner-Mitchell case* the Court stated that the views therein were not contrary to its decision in the *Maiatico case, supra,* saying: "There the Secretary of the Interior who exacted a bond for the United States in the performance of a contract of construction of buildings for Howard University, had no authority whatever to exact a bond because the buildings in question were not public buildings."

IV. Petitioner's Criticisms of the Decision Below.

On pages 13 and 16 of petitioner's brief, references are made to the memorandum opinion of the Solicitor of the Department of the Interior to the Assistant Secretary dated March 13, 1940, (R. 23-25) containing his opinion that the Howard University Library Building is a public work within the meaning of the Miller Act. The Court's attention is invited to the fact that when this memorandum opinion was offered in evidence objection to its admissability was promptly made and subscribed thereon on the ground that the exhibit was an inter-departmental communication and not binding on the defendants below. (R. 23)

Also it is noted that the contract for the library building for Howard University involved in this suit was entered into on December 5, 1936, (R. 12) and that the *Maiatico case, supra,* was decided and became final by this Court's denial of a writ of *certiorari* on December 9, 1935, (296 U. S. 649). Yet on March 13, 1940, the Solicitor attempted to justify the Secretary's action more than three years earlier in demanding a payment bond. Obviously this opinion of the Solicitor, even if admissible in evidence in this case, could not have influenced the Secretary's action when it was taken in 1935, and this exhibit should be disregarded by the Court.

Petitioner argues at p. 12 and 17 of its brief that the mechanics lien statute of the District of Columbia, Title 38, Secs. 101-120, District of Columbia Code, 1940, 31 Stat. 1384, are inoperative because the mechanics lien statutes only provide a recourse against funds in the hands of the

owner; that respondents contend that the United States is not the owner, and it follows, they state, that there never were and never would be any funds in the hands of the owner subject to the operation of the lien statute.

That argument completely ignores the very wording of the mechanics lien statutes which makes them applicable to the owner or the agent of the owner. Congress authorized the Secretary of the Interior to enter into the contract for the construction of the building well knowing that Howard University was the legal owner of the land upon which the building was to be erected. For the purposes of the lien statutes the head of the department, if not the United States itself, became the agent of the owners in the transaction. The University, as we have previously shown, knew its requirements and drafted its plans and specifications to suit its needs, and when these drawings and specifications were accepted and approved by the Secretary of the Interior, the Assistant Secretary, as contracting officer, approved the will of the University and became the agent of the University in the construction of the building. All of petitioner's rights asserted here could have been preserved had it proceeded under the lien laws of the District of Columbia. Had it followed the requirements of the local lien laws and given notice to the Secretary of the Interior, or to the contracting officer, the Assistant Secretary of the Interior, of its intention to claim a lien under the laws of the District of Columbia, there is no legal reason why the officials representing the United States and Howard University should not have withheld from the contractors funds sufficient to pay its claim. And, under such proper notice, respondents could have also protected themselves with regard to the debts due by one of their subcontractors to a materialman. (R. 2)

The cases cited by petitioner on p. 12 have no bearing on the issue.

CONCLUSION.

The work here involved was not a public work, nor was the building erected under the contract a public building, of the United States within the meaning of the Miller Act; the interpretation placed on the Miller Act by the Secretary was erroneous and the giving of a payment bond thereunder was a nullity; in the absence of statutory provision no suit can be maintained in the District of Columbia by a third party on a bond to which the claimant is not a party or privy; the judgment and decision of the Court below is correct and not in conflict with any prior decision; and the writ issued herein should be recalled and dismissed.

Respectfully submitted,

PRENTICE E. EDRINGTON,
A. M. HOLCOMBE,
438 Munsey Building,
Washington, D. C.
Attorneys for Respondents.

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